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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 269.

IN THE MATTER
OF
TOBIAS LESSER, ISRAEL LESSER and SIMON LESSER, and the firm of LESSER BROTHERS,
Bankrupts.

APPLICATION
OF
METCALF BROTHERS & COMPANY, *Petitioners*, for Review of certain Proceedings, *etc.*

BENJAMIN BARKER, JR., Trustee in Bankruptcy,
Respondent.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF.

OTTO T. HESS,
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Of Counsel for the Respondent.

C. G. Burgoyne, Walker and Centre Streets, New York.

In the Supreme Court of the United States.

In the Matter of Tobias Lesser, Israel Lesser and Simon Lesser, and the firm of Lesser Brothers, Bankrupts.	October Term, 1901.
Application of Metcalf Brothers & Company, *Petitioners*, for Review of certain Proceedings, *etc.*	No. 269.
Benjamin Barker, Jr., Trustee in Bankruptcy, *Respondent.*	

BRIEF ON BEHALF OF BENJAMIN BARKER, JR., TRUSTEE IN BANKRUPTCY.

Statement.

This matter comes before this Court on certification of certain questions by the United States Circuit Court of Appeals for the Second Circuit, arising in a proceed-

ing in bankruptcy under Section 25, Subdivision *d*, of the National Bankruptcy Act of 1898.

The order, the correctness of which is sought to be reviewed, was one made by the United States District Court for the Southern District of New York, enjoining the threatened appropriation by certain creditors of the bankrupts of assets of the estate, by virtue of an alleged lien, determined by the Courts below to be in violation of the provisions of the Bankruptcy Act.

The questions certified embody in interrogative form certain of the legal aspects contended for by the lienors. The facts briefly stated, are as follows :

Tobias Lesser, Israel Lesser and Simon Lesser, comprising the firm of Lesser Brothers, the bankrupts, had been doing an extensive business in the City of New York as wholesale clothiers. On the 2d of October, 1896, after having on that day confessed judgments in the Supreme Court of the State of New York to various creditors, under which executions were at once issued to the Sheriff of the County of New York, the bankrupts transferred all their outstanding accounts to others and to still another made conveyances of their individual real estate. Having thus entirely depleted themselves of their assets, on the same day two of the partners commenced a collusive action in the Supreme Court of the State of New York, in New York County, against the third, for the dissolution of the firm, and on the same day, on consent of all parties to the action, one Morris Moses, who was nominated by and was in collusion with them, was, by a fraud upon the Court, appointed Receiver of the firm. On application of certain creditors to the Court, James T. Franklin was appointed co-Receiver. On the 2d day of October, 1896, and during the days immediately ensuing, replevin actions were begun by numerous creditors of the firm to recover goods sold and delivered by them to Lesser Brothers. The Sheriff having levied on the

property under the confessed judgments, the writs had issued to one of the Coroners of the County of New York. The Receivers thereupon brought an action in the Supreme Court of the State of New York, in New York County, to enjoin the prosecution of these numerous suits, and the Court thereupon made an order in that suit on the 23d of November, 1896, enjoining the replevin creditors from prosecuting their actions, following the precedent in such cases established by *National Park Bank vs. Goddard*, 131 N. Y., 494. The Sheriff, under the executions issued upon the confessed judgments, had levied on all the merchandise of Lesser Brothers, and the Court thereupon directed that the property so levied upon by the Sheriff be turned over to the Receivers Franklin and Moses, and that it should be held by them subject to the claims of all parties. Pursuant to this order the goods were sold and the Receivers now hold the proceeds thereof.

In December, 1896, the petitioners, Metcalf Brothers & Company, creditors of Lesser Brothers who after the failure had reduced their claim to judgment, commenced a judgment creditors' action in the Supreme Court of the State of New York, in New York County, against the Lessers, their Receivers Moses and Franklin, the confessed judgment creditors, two of the transferees of accounts and the transferee of the real estate, to set aside the receivership, the conveyances, transfers and confessions of judgment as fraudulent and void as against them. They asked for the relief usual in a judgment creditor's action. *Metcalf Brothers & Company did not obtain an injunction nor did they have a Receiver appointed in that action.* Moses and Franklin, the Receivers of Lesser Brothers, who were parties defendant to that action, asked for certain relief against some of their co-defendants. That action was tried at a Special Term of the Supreme Court before Mr. Justice RUSSELL, and judgment was

rendered that the acts of the Lessers were fraudulent, but that the assets should be turned over to the Receivers Moses and Franklin, Mr. Justice RUSSELL holding that the plaintiffs would "be rewarded to a substantial extent by the relief granted if they" received "their fair share of the insolvents' estate" (*Metcalf vs. Moses*, 22 Misc., 664, at page 668). This judgment was entered on the 6th day of April, 1898. An appeal was taken to the Appellate Division, which in January, 1899, reversed the judgment of the Court below in so far as it denied the plaintiffs their preference, but affirmed the judgment in other respects, except in so far as the latter set aside the transfers to defendants Adler and Lilianthal (*Metcalf vs. Moses*, 35 App. Div., 596).

Though the decision of the Appellate Division was handed down in December, 1898, to quote the language of the certificate, "delay in the entry of final judgment was caused by various motions before the Appellate Division for reargument," and it was not until January 31st, 1899, that the judgment was entered giving Metcalf Brothers & Company their preference.* Less than four months thereafter, and on May 12th, 1899, the Lessers, individually and as a firm, were, on their voluntary petition, adjudicated bankrupts, and the respondent was appointed trustee in bankruptcy of the Lessers, individually and as a firm.

By Section 67*f* of the Bankruptcy Act it is declared that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person

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* Owing to an appeal to the Court of Appeals, accompanied by a stay of all proceedings, pending the appeal no attempt was made to enforce the judgment of January 31st, 1899. The stay expiring with the affirmance of the judgment by the Court of Appeals in February, 1900 (*Metcalf vs. Moses*, 161 N. Y., 587), the trustee in bankruptcy sought the aid of the District Court.

who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy,

> "*shall be deemed null and void* in case he (the bankrupt) is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such * * * judgment * * * or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect;" * * *

Section 70 of the Act provides that the trustee shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all

> "(4) property transferred by him (the bankrupt) in fraud of his creditors."

By Section 2 of the Act the District Court has jurisdiction to

> "(15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act."

On the foregoing facts the United States Circuit Court of Appeals for the Second Circuit affirmed the order of the United States District Court for the Southern District of New York, enjoining Metcalf Brothers &

Company, creditors of the bankrupts, from appropriating the assets of the estate.

The opinion of Judge ADDISON BROWN, of the District Court, is reported in 3 Am. Bank. Rep., 815; 100 Fed. Rep., 433.

The opinion of the Circuit Court of Appeals reviewing at length what it refers to as "the carefully-stated opinion of the District Judge," and concurring therein, is reported in 5 Am. Bank. Rep., 320.

Subsequently, on a motion by Metcalf Brothers & Company praying for a reargument, or in the alternative to have the matter reviewed by this Court, the Circuit Court of Appeals withheld its mandate and certified the following questions to this Court:

(1) Had the District Court of the United States for the Southern District of New York jurisdiction to make the injunction order in question?

(2) If said Court had jurisdiction to restrain Metcalf Brothers & Co. from receiving the fund in question, could such jurisdiction be exercised by summary proceedings?

(3) Did Metcalf Brothers & Co. by the commencement of their creditors' action acquire a lien on the property of the bankrupts superior to the title of the trustee thereto?

(4) If the lien acquired by the commencement of the creditors' action was inchoate merely, was it perfected by a judgment obtained more than four months prior to the filing of the petition of the Lessers in bankruptcy within the meaning of the provisions of the Act of Congress of July 1, 1898, known as the Bankruptcy Act?

(5) If the lien acquired by the commencement of the creditors' action was inchoate merely, was the judg-

ment in the creditors' action, whenever obtained, one which is avoided by any of the provisions of the Act of Congress of July 1, 1898, known as the Bankruptcy Act?

The Questions Presented.

Several of the questions certified are so inter-related that unnecessary repetition may be saved by an examination of the somewhat complicated facts and of the law applicable thereto, even though to a certain extent such examination does not follow exactly the questions in the order given.

In order for example that the Court may determine whether or not the District Court had jurisdiction in the premises, it is essential that the facts on which such jurisdiction depends should be fully reviewed.

But at the outset we respectfully submit that in accordance with the rulings of this Court on the practice of certifying questions from the United States Circuit Court of Appeals, it must be held that the first question in the case at bar cannot be answered at all by this Court. This Court had before it the precise point which we now raise, in *McHenry vs. Alford*, 168 U. S., 651.

The question certified in the case at bar is:

> HAD THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK JURISDICTION TO MAKE THE INJUNCTION ORDER IN QUESTION?

In the case cited the question was (at p. 658):

> "Has the United States Circuit Court for the District of North Dakota jurisdiction to hear and decide said case?"

This Court refused to answer that question on the ground that it did not plainly raise a single question

of law, but obviously brought up the whole case for review. The Court says (at p. 659), Mr. Justice PECKHAM writing the opinion, using the language of the Chief Justice in *United States vs. Union Pacific Railway*, 168 U. S., 505, that each question certified to this Court from the United States Circuit Court of Appeals has to be

> " a distinct point or proposition of law, clearly stated, so that it can be distinctly answered without regard to the other issues of law in the case ; to be a question of law only and not a question of fact, or of mixed law and fact, and hence could not * * * * embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions."

In *McHenry vs. Alford*, the Court gave as its reason for refusing to answer the question, not so much that in so doing it would violate any technical rule of Court, as because this Court, without the record before it, would not assume to overrule the conclusion reached by the lower Court after consideration of the whole case with the record before it.

The same difficulty that confronts the Court in answering such a general question still more strikingly confronts the litigants. Under a long established rule of the Federal Courts, when a case comes up on a writ of error, the plaintiff in error must preface his argument with a specific enumeration of the grounds on which he asks for a reversal. Thus any issue that he may invite as to the efficiency of the proceeding below in acquiring jurisdiction is specifically and distinctly drawn. In such cases the question of jurisdiction is not only specified in the brief, but is specified in the record and is clearly presented by the proper exceptions in the bill of exceptions. On such a record, therefore, the question of jurisdiction is always capable of determination by a Court of last resort, for that

Court has everything before it that the lower Court had before it. The suggestion in *McHenry vs. Alford* (at p. 659) that the Court could not grope its way "through the papers submitted and "examine every objection that imagination could raise, "with no hint as to what, if any, objection is really "supposed to exist," points out the insuperable obstacle that prevents this Court answering the first question in the case at bar.

So in this case, for example, in the Courts below something was said at different times about insufficient service of the papers, an objection apparently waived, inasmuch as the creditors appeared in this proceeding and argued the motion on its merits; something was said about the creditors not being proper parties to the bankruptcy proceedings, an objection answered by the District Court, and not seriously pressed in the Circuit Court of Appeals. And if the objection to the jurisdiction be the general one that the District Court of the United States is not vested with power to make such an order, then before this Court can answer this question it will have to read the 19 subdivisions of Section 2 of the Bankruptcy Act relating to the jurisdiction of the District Court, and when it has read them it will be in no better position to answer the question than it was before, because it will have no record to show whether or not the papers presented to the Court below set forth the facts to which one of the subdivisions of Section 2 might be applicable. In *McHenry vs. Alford*, the Court said (at p. 659): "Guided by these rules, we find that the "first question does not comply with their require-"ments. No single question of law is plainly raised "therein." The first question certified to this Court in the case at bar is open to the same fatal objection.

We think, therefore, that the question of jurisdiction in the premises will be sufficiently covered in the

consideration of the second question certified to this Court, and which, as we have before indicated, we will discuss after we have presented to the Court the reasons which led the District Court to exercise such jurisdiction.

On the very meagre record presented by the certificate we fear that the Court may have such difficulty in answering this second jurisdictional question as to impel it to take the same course as to that also as was taken in *McHenry vs. Alford;* nevertheless this would accomplish but little good to any of the parties to this proceeding, and we therefore think that after our discussion of the third question this Court will feel warranted in answering the second question in the affirmative.

The third question presented to this Court is as follows:

> DID METCALF BROTHERS & CO. BY THE COMMENCEMENT OF THEIR CREDITORS' ACTION ACQUIRE A LIEN ON THE PROPERTY OF THE BANKRUPTS SUPERIOR TO THE TITLE OF THE TRUSTEE THERETO?

The contention of Metcalf Brothers & Company is that by the commencement of their judgment creditors' action in December, 1896, they obtained a lien on the property which should be recognized by the Court of Bankruptcy, notwithstanding that the judgment which they obtained is made void by the provisions of Section 67 *f* of the Bankruptcy Act.

And first it should be noted that in the case at bar there were no equitable assets. This is more fully discussed hereafter, but in order to follow at length the petitioners' careful and elaborate presentation, we will consider the nature of the lien obtained in a judgment creditor's action.

The fourth and fifth questions involve a further examination of the principles of law necessarily consid-

ered in any discussion of the third question, particularly in reference to the effect of the Bankruptcy Act.

I.

The nature of the rights obtained by a judgment creditor by filing a creditor's bill to set aside fraudulent transfers.

Out of the vast number of actions brought by judgment creditors to set aside fraudulent transfers made by judgment debtors, a doctrine has gradually grown up in relation to the respective priority among themselves of such creditors. This doctrine, expressed most favorably to the lienors (and without reference to the limitations necessarily imposed by the Bankruptcy Act, to which we will refer later), is as follows:

(a) As to Tangible Assets.

If a judgment creditor brings an action to set aside transfers of tangible assets—*viz.*, property in its *nature* subject to *execution*—made by the judgment debtor in fraud of his creditors, he will, irrespective of any similar action brought by any other judgment creditor, and in the absence of any levy or other actual physical *bona fide* change of ownership and of possession, be entitled if he recover final judgment, to receive the assets in question. But if at any time before he realizes the fruits of such a judgment, *another* judgment creditor proceeds actually to levy his execution, thus disregarding and *quoad hoc* nullifying the outstanding title given by the fraudulent transfer—and defends an action for trespass brought against the Sheriff, on the ground of the invalidity of the transfer—then such

creditor so levying execution will be allowed to retain the fruits thereof even as against the judgment creditor filing his bill in equity, although the latter had filed his bill before the levying of the execution. The theory upon which this last principle is based is that both judgment creditors being entitled to recover the amount of their judgments and both having originally the same equity, have, at the outset, the same right to nullify the fraudulent transfer. But the creditor, who in addition to his equity, acquires the *legal* title obtained by the levy, will be protected against him who has merely the equity; and the latter creditor—*viz.*, he who files the creditor's bill *without levying* execution—suffers no injustice, because the same resort was open to him, and he might, had he chosen, have levied an execution and taken the property notwithstanding the fraudulent transfer, and then justified and indemnified the Sheriff if the latter should be sued for trespass. It is manifest then that priority is in no way dependent upon the creditor first resorting to a Court of Chancery and invoking its aid, because the creditor who does first resort to that Court is liable to lose his priority to one who never resorts to a Court of Chancery at all. Nor is a different rule applied in cases where the property, although tangible, is for any reason not actually subject to execution. In *First National Bank vs. Shuler* (153 N. Y., at p. 172), it was said:

> "But in respect of chattels, subject to be taken
> "on execution, the rule seems to be that unless
> "the action is brought in aid of an execution,
> "the mere commencement of the action creates
> "no lien as against other creditors, and if any lien
> "whatever exists, it is so incomplete and imper-
> "fect that it is subject to be overreached by a sub-
> "sequent levy in favor of other creditors, made be-
> "fore the appointment of a receiver."

And in that case the Court held no lien attached, though the property was not in fact subject to

execution, being in the hands of the executor of an unadministered estate.

We have thus considered one of the great classes of judgment creditors' actions, and in that class is included every possible case of an action intended to reach tangible assets which are in their nature subject to execution; all other property falls under the other subdivision about to be considered; naturally all property which is not tangible is intangible, and all property which *is not* property in its nature subject to execution, *is* property not in its nature subject to execution.

(b) As to Intangible or "Equitable" Assets.

1. The nature of the lien.

Intangible assets, or property in its nature not subject to levy on execution, are often termed for convenience "equitable assets" and we shall use this term in speaking of them. It is often loosely stated that a judgment creditor, who is unable by any remedy at law to reach his debtor's equitable assets in the hands of a third person, by the mere filing of his bill in a court of equity obtains a lien on those assets.

The nature of a lien, however, as viewed by courts of equity, is to be determined not by vague and general language taken from reported opinions, but only by an examination of what the Courts have done in the particular cases. It is the *judgments* which Courts have rendered that furnish the test.

We maintain that the only lien against equitable assets acquired by a judgment creditor by the mere filing of a bill in equity is a right to have his judgment first paid, if he succeeds in obtaining a judgment setting aside the transfers—paid, in other words, to the exclusion of the transferees' legal title, and paid prior to the claims of other judgment creditors who may begin similar actions. In other words, it is only a

right to priority of payment *in case the judgment creditor obtains his judgment in equity.* Now, because such a right to priority of payment has some of the characteristics of a "lien," it has sometimes been spoken of as a "lien." For most purposes it is a lien, but it is not a lien in the important and, in this case, controlling feature—*viz.*, that *it creates no present right or title in or to the chose in action.*

In this it differs radically from a mortgage, the typical lien. A mortgage effectually transfers a present interest and equitable estate in the land, out of the mortgagor and into the mortgagee. It is not an inchoate lien, but is effective from the moment of its creation and needs no judgment of foreclosure to perfect the transfer. If the debt is not paid the mortgagee is entitled to take the rents and profits to pay his debt. And he takes them under the present grant of the mortgage itself. All that the decree of foreclosure does, is to eliminate the equity of redemption remaining in the mortgagor so that a complete title may be given; but the foreclosure decree *creates* no lien and *perfects* no lien. Or, take the case of the lien of an execution; here the levy itself creates the lien by substituting the possession of an officer for that of the debtor. It is a forcible taking away of property, and completes the transfer *ex proprio vigore.* In the same way a lien on real estate takes by statute from the debtor a certain right, estate or interest in his land and vests it in his creditor, who may realize on it on an execution sale. In all these cases of true liens we have the constant quality of a present transfer of part of the debtor's property out of himself and into some one else, and this is likewise true of equitable liens. A complete equitable lien, no less than a legal lien, involves the present lessening of one person's title and a transfer of *some part* of that title into another. Of course this always carries with it a right to priority of payment; and so ordinarily the right to priority of payment is as good as a present in-

terest in the thing itself. Now the whole equitable doctrine of preference obtained against equitable assets by filing a creditor's bill is based on this right to *priority of payment*. It has come into being in recognition of the practical justice of giving such priority, and such priority is all that the doctrine involves. It has nothing to do with the essential characteristics of a real lien, such as a mortgage lien, and when an attempt is made to extend it in that way the real nature of the lien becomes clear. To obtain the result of a present transfer the remedy of a receivership is open to the judgment creditor, and if he does not avail himself of it, while he is safe against the acts of the debtor and against the claims of other creditors similarly situated, he is not protected against such transfers of title *in invitum* as may in the meantime be imposed by the paramount Act of Congress in establishing a uniform system of bankruptcy.

The learned counsel for the petitioners terms the filing of the creditor's bill the levying of an equitable execution; but such an execution must in order to operate as a real lien be perfected by a judgment, and, until then, the preference obtained by the judgment creditor is simply one of priority in the event of the successful *levy* of the equitable execution on the assets of the debtor by the perfected judgment. When an execution is delivered to the Sheriff, no lien is obtained until the Sheriff has actually made the levy. The law presumes that the levy is made for the benefit of the judgment creditor who first placed the writ in the hands of the Sheriff. What the Courts mean by terming the filing of the bill the giving of a lien or a priority to a judgment creditor, is exactly analagous to what happens in the case of the delivery of a writ to the Sheriff. At law the levy is presumed to be made for the benefit of the judgment creditor who has first delivered the writ to the Sheriff; in equity the equitable execution in the

form of the decree of a court of equity is presumed to be made for the benefit of the person who first filed his bill. For the filing of the bill is simply this : A writ of *elegit* or *fieri facias* has been issued to the Sheriff, but certain legal obstacles interfere with his making the levy and the judgment creditor then applies to the Chancellor to make the levy. But before the judgment creditor can be said to obtain a lien the levy must actually be made ; and if the rights of third parties intervene before it is made, the priority of the judgment creditor who has filed his bill stands on no firmer ground than the priority of the judgment creditor who has first delivered his writ to the Sheriff. While it may be true that a judgment creditor, by invoking the aid of a receivership, might take the assets of the debtor within the protecting arm of the Court of Chancery, and keep them from the grasp of the trustee in bankruptcy when the debtor subsequently goes into bankruptcy, yet, if he does *not* do this, the property is lost to him.

In the case at bar no Receiver had been appointed or even applied for, and, though the petitioners were safe against the acts of the debtors and against the claims of other creditors similarly situated, they were not, as already pointed out, protected against such transfers of title *in invitum* as might in the meantime be imposed, and which were imposed, by the supreme law of the land.

The parallel between the mortgage and the judgment creditor's action, so much relied on by our opponents, would seem, on analysis, utterly to fall. As we have pointed out, the lien of a mortgage is not *created* in the action to foreclose it. The alleged lien of the judgment creditor's action is so created. If the action to foreclose the mortgage were discontinued the day after it was begun, that would in no way affect the lien of the mortgage. But the filing of a creditor's bill is merely the *starting* of a lien. Such a " lien " is in its very essence integrally bound up with the specific

legal proceeding which gives it birth, and it never fructifies except by the consummation of that very legal proceeding; the whole completed proceeding is necessary to perfect the lien, and the chain is no stronger than its weakest link. If the action be discontinued, the "lien" falls and that particular "lien" can never be revived. The judgment creditor may get a fresh "lien" by beginning a new action, but it is in no way a continuance of his old "lien." The "lien" is inseparably connected from beginning to end with the specific legal proceeding which inaugurates it. If this legal proceeding meets an insurmountable obstacle the lien dies with the suit. And the Bankruptcy Act, in its provisions avoiding judgments obtained within four months of the bankruptcy, is precisely such an obstacle.

A creditor's bill is in this respect strikingly like the judgment note in use in some jurisdictions. The inchoate lien initiated by the note is simply evidence of *the right to have a judgment* (which is much more than a creditor's bill is). It is evidence of the highest nature; it is a judgment, all except the entry. And yet a judgment entered on such a note within four months of bankruptcy has been held to be void under the Bankruptcy Act. *Matter of Richards*, 96 Fed. Rep., 935 (U. S. Circuit Court of Appeals, Seventh Circuit).

In that case the Court says (at p. 941):

> "We are also unable to uphold the contention "that the lien of this judgment must be upheld "because the acts which led up to and pro- "cured it occurred more than four months before "the bankruptcy, and therefore did not constitute "the acts of bankruptcy within subdivisions '*a*' "and '*b*' of section 3. The validity of the lien "depends upon the terms of the act speaking to "that subject, but not upon the question whether "the acts which resulted in the lien were acts "which subjected the debtor to proceedings in "bankruptcy. It is doubtless true that the debtor

"could not have been forced into bankruptcy be-
"cause of of the acts done by him; but under the
"law, when for any reason bankruptcy has super-
"vened and adjudication has been determined by
"the court, all liens which fall under the ban of
"section 67 are avoided, whether the debtor has
"been or could have been adjudicated a bankrupt
"for his acts with reference any specific lien. We
"are constrained to the conclusion that by sub-
"division '*f*' of section 67 all liens obtained
"through legal proceedings 'against a person who
"'is insolvent,' within four months of the bank-
"ruptcy are avoided. It is not within our province
"to speak of the policy of the act. It is sufficient
"to us that congress has so declared. It asserts
"the principle, that as between creditors, 'equal-
"'ity is equity,' and that the race of diligence
"must cease, with respect to legal proceedings
"against a person who is insolvent, at the com-
"mencement of four months preceding the filing
"of the petition. This conclusion does not pre-
"vent the honest debtor seeking to work out from
"embarrassments from receiving present aid to
"that end, and from giving proper security for the
"aid received. But the one advancing money
"must take a present security other than that
"obtained through legal proceedings against an
"insolvent."

In the same way a confession of judgment, made out by a debtor and delivered to his creditor, is the highest possible evidence of the creditor's right to have a judgment, far higher than a creditor's bill, and conclusive, which the latter is not. And yet if the creditor does not actually enter his judgment until within the four months, he loses his lien, the case being practically the same as that of a judgment note just cited.

These instances bring out clearly the nature of a lien whose complete creation is deferred until the entry of judgment in the legal proceeding itself. In all these cases, and in the same way in a judgment creditor's action, the creditor, unlike a mortgagee, or a pledgee, or a vendor in possession, *can in no possible*

way complete his lien except by a judgment, and such a judgment is nullified and rendered unavailable by the Bankruptcy Act. That act imperatively declares that the judgment is *void*, and its provisions would be flagrantly violated if, under the guise of recognizing his lien, the Court allowed the creditor to enforce the judgment. Enforcement of the *judgment* is the one thing the act imperatively forbids, and that is all we are seeking to enjoin. We do not ask to enjoin the operation of whatever "lien" the judgment creditors may have obtained by filing their bill. Let them give that lien effect in whatever way is open to them, but we insist that they must not give it effect by a judgment, for that means is expressly prohibited by the Bankruptcy Act.

The act in effect provides that if a litigant applies to the Court to create and perfect a lien on equitable assets the legal title to which is in another, he must procure his adjudication more than four months before his debtor is made a bankrupt. If he does not procure his judgment until after the four months have begun to run, the judgment is absolutely void as against the representative of the creditors in bankruptcy, and it is too late for him to obtain his preference. The difference is fundamental between a judgment *effecting* a lien and a judgment *enforcing* a lien. One is an integral and inseparable constituent of the lien itself and the other is not.

We think it is not necessary to dwell upon this further, for it is clearly apparent that the lien of these judgment creditors, whatever it be, has its origin in the action of *Metcalf vs. Moses*. It would fall with the discontinuance of that action. It must fall with the legislative annulment of the judgment in that action.

This whole question was exhaustively considered by the Federal Courts many years ago, contemporaneously with the decision of the State Court in *Storm vs. Waddell*, on which the petitioners base their contention,

and the law finally settled as we have stated it and as it was applied below.

Re Coster, 1 New York Legal Observer, 53; s. c., *sub nom. Ex parte* Waddell, Fed. Cases, 17,027.

The opinion contains a careful review of all the cases but its length forbids insertion in our brief. The question at bar was the precise question there involved, and Judge BETTS sums up the discussion as follows:

> "I think, therefore, the judgment creditor in "this case, has no rightful authority over the "funds of the bankrupt, by means of this credit- "or's bill, which can withdraw them from distribu- "tion in subordination to the bankrupt act, and "appropriate them exclusively to his own debts.
>
> "Nothing more is presented by the petition and "motion for the decision of this court, than the "general question, whether filing a creditor's bill "in the state court of chancery constitutes a lien, "or other security, on the effects of the bankrupt, "valid by the laws of the State, and which, by "virtue of the last proviso of the 2d Section of "the Bankrupt Act prevents such effects passing "to the assignee of the bankrupt. I am of opin- "ion that it does not."
>
> Fed. Cases, 17,027, p. 1315.

2. Authorities cited by petitioners.

We will proceed therefore to examine the cases cited by the learned counsel for the petitioners, and it will be seen that what was actually decided in these cases was merely that the judgment creditor would, under certain circumstances, have priority of payment. It is not of great consequence whether the Judges call this right a "lien" or anything else. It is of the utmost consequence how they effectuate it and to what extent. Under the old acts relating to bankruptcy a judgment in a judgment creditor's action could be

entered at any time, even after bankruptcy. There was nothing in those acts to prevent it. There is an insurmountable obstacle under the present act.

Miller vs. Sherry, 69 U. S. (2 Wall.), 237, was a case involving a creditor's bill against real estate only, and, as a matter of fact, it was held that the particular bill in question did not create a lien on the real estate involved.

Storm vs. Waddell, 2 Sandf., Ch. 494, is discussed *infra*, (pp. 23, 24).

Freedman's Savings & Trust Co. vs. Earle, 110 U. S., 710, cited by the petitioners, merely reiterates the right of the creditor first filing his bill to priority of payment among creditors similarly situated. The reference to "bankruptcy" is a mere *dictum* by way of illustration, and was made, of course, without any reference to the present Bankruptcy Act, which was not then in existence.

In fact, the language cited by petitioners from this very case is as clear a statement as can be found of the nature of the lien as pointed out above; that it is inseparably connected from beginning to end with the specific legal proceeding which inaugurates it.

"*It is the execution first begun to be executed, unless* "*otherwise regulated by statute, which is entitled* "*to priority. The filing of the bill, in cases of equitable* "*execution, is the beginning of executing it.*" The italics are not ours.

The case of *Ex parte General Assignee*, Fed. Cases 5305, merely emphasizes our position that the judgment creditor, to perfect his lien, must procure the appointment of a Receiver. The Court there says (at p. 167):

"If the complainant, after filing his bill and obtain- "ing an injunction, fails to prosecute his suit with "proper diligence *and to obtain the appointment of a*

" *receiver*, the case of *Osborn vs. Heyer*, 2 Paige, 342, " is an authority for saying that his injunction will be " dissolved, and his lien superseded."

Clark vs. Rist, 3 McLean, 494, was a case under the Act of 1841; it merely stated that under that act the creditor in that case had a lien valid under the laws of Ohio, which was expressly saved by the Bankruptcy Act, and that for that reason an injunction should not issue.

Johnson, Assignee, vs. Rogers, 15 N. B. R., 1:

This was a decision of the United States District Court, in a district included in the Second Circuit, and is in flat contradiction to the original decision of the United States Circuit Court of Appeals in the case at bar. The considerations adduced in the Court below, and which have been made the ground of this decision, were not presented to the Court.

Kimberling vs. Hartly, 1 Fed. Rep., 571:

This was a case affecting real estate only, and the creditor's rights were saved by a *lis pendens*.

Sedgwick vs. Menck, 1 N. B. R., 675:

In that case the judgment creditor had not only filed his bill, but *had recovered judgment setting aside an assignment by one Beiser, and a Receiver had been appointed;* and nine years thereafter, Congress having meanwhile passed a Bankruptcy Act and Beiser having become a bankrupt, his assignee in bankruptcy applied by bill to the United States Circuit Court to compel the State Court receiver to turn over to the assignee the property of the bankrupt which had been included in the void assignment. It goes without saying that the application was denied. There is not the faintest resemblance to the circumstances in the case at bar.

Doyle vs. Heath, 47 Atlantic Rep., 213; *Taylor vs. Taylor*, 59 N. J. Equity, 86:

These decisions are in conflict with the original decision of the United States Circuit Court of Appeals in the case at bar; the considerations on which the latter decision was made were not presented to or discussed by the Courts in the two cases cited. The same is true of *Iselin vs. Goldstein*, 35 Misc., 489, the case decided at Special Term; nor does it appear in what way the question of the right of the trustee in bankruptcy to avoid the judgment creditor's preference arose in that case, nor even whether he was a party to the action, so far as the report shows; the suggestion of the trustee's rights came from the fraudulent debtor himself, to whom it was, of, course, unavailable.

Bank vs. Katz, 1 Am. Bank. Rep., 19, and *Reid vs. Cross*, 1 Am. Bank. Rep., 34, which simply follows the former case without further discussion, are destitute of any analysis or discussion of the principles involved and merely assume that the creditor filing his bill thereby obtains a lien good against the trustee in bankruptcy.

In *Storm vs. Waddell*, 2 Sandf. Ch., 494, *a Receiver had been appointed in the judgment creditor's action two weeks before the bankruptcy proceedings.* The Assistant Vice-Chancellor would apparently, however, have maintained the right of the judgment creditor as against the assignee in bankruptcy, even had there been no receiver. The authority of this case has been much weakened, in the New York Courts. It is carefully reviewed in *Stewart vs. Isidor*, 5 Abb. Pr. Rep., N. S., 68, and held inapplicable to a situation such as that at bar. There the Court says:

"The rule would, in my judgment, be more satisfac-
"tory if confined to cases where the disposition of the
"property sought to be reached had been restrained
"by injunction, or where the property itself had been

" placed in the hands of a receiver pending the " suit. Indeed, it was suggested in *Storm vs.* " *Waddell*, above cited, that 'in regard to chat- " 'tels subject to execution, the lien may de- " 'pend upon the receivership;' but in respect to " equitable interests and things in action, it was dis- " tinctly held that the lien was acquired by the mere " commencement of the suit. *The rule is not elsewhere* " *so broadly stated;* and I think that its application to " strict creditor's bills, where, upon filing the bill, an " injunction was taken out and served with the sub- " pœna to answer, is all that is fairly deducible from a " careful examination of the other cases cited. Where " the action is simply to set aside an alleged fraudu- " lent transfer, the lien, in the absence of any restraint " by injunction upon the fraudulent transferee, must " be purely theoretical. As a fact, it is dependent " upon success in the action " (5 Abb. Pr. Rep., N. S., at pp. 70, 71).

But, even if the opinion in *Storm vs. Waddell* were of unimpaired force in the State Courts of New York, it is avowedly in flat contradiction to the law laid down in the Federal Courts, and the learned Assistant Vice-Chancellor frankly acknowledges this fact.

" On the other hand, Judge BETTS, of the Southern " District of New York, a jurist of more experience " and certainly of no less learning than the other, and " whose judgments have always commanded the entire " respect and general assent of the bar, decided " directly to the contrary *(Re Coster*, 1 N. Y. Legal " Observer, 53*)*. The petition was filed by Coster " after the commencement of the creditor's suit, but " before the order for a receiver." (2 Sandf. Ch., p. 518).

Lynch vs. Johnson, 48 N. Y., 27, was decided by the temporary Commission of Appeals. The Commissioners were divided as to the grounds of the decision. Four of the Commissioners based their judgment on an application of *Storm vs. Waddell*

(supra) to receiverships in supplementary proceedings ; the other Commissioners voted to sustain the judgment on other grounds.

In *First Natl. Bank vs. Shuler*, 153 N. Y., 163, cited on behalf of the petitioners, the Court reversed a judgment setting aside fraudulent transfers of tangible assets on the ground that as the alleged fraudulent assignor had died *pendente lite*, and before the appointment of a receiver, and his executors had not been joined as defendants, the judgment was fatally defective. The part of the opinion quoted by counsel for the petitioners is merely a *dictum*, but even that part contains nothing opposed to our contention. It merely points out that a creditor, by filing his bill against equitable assets, acquires a lien, "*which* "*entitles him, in the successful event of the action, to* "*priority of payment thereout in preference to other* "*creditors* * * *." We do not dispute this; the trouble with the petitioners' case is that they have not had a "successful event of the action," because their attempted judgment was nullified by the Bankruptcy Act.

In *Roberts vs. A. & W. S. R. R. Co.*, 25 Barb., 662, cited by the learned counsel, a receiver had been appointed in a judgment creditor's suit. The Court says (at p. 663):

"The right of the complainant in a creditor's bill is "*sometimes called a lien*, but it gives an immediate "right to have a transfer of the defendant's property "made to a receiver. So that as between the re- "ceiver and a subsequent assignee, the title to the "property itself passes to the receiver, and from the "judgment debtor."

This is, in fact, a very clear statement of this right, which is "sometimes called a lien." It is a right *to have* a transfer of the defendant's property made to a receiver. This is no more *a transfer* than the *right to*

have a receivership of mortgaged property is *a receivership.*

In *Jeffres vs. Cochrane*, 47 Barb., 557, plaintiff was appointed receiver of a judgment debtor, and brought an action against the debtor and his wife to reach three notes which he alleged had been transferred by the debtor to his wife. During the pendency of the action the wife transferred one of the notes to her attorney. Plaintiff recovered judgment against the wife, and, not being able to satisfy his judgment, sued the attorney. Held, that the defendant (the attorney) having purchased *pendente lite with actual notice*, was bound by the judgment. On appeal this judgment was affirmed (48 N. Y., 671). Had the transferee taken without notice the Court would have held otherwise (*Matter of Clover*, 8 App. Div., 556; aff., 154 N. Y., 443). This fact shows the fallacy of calling the petitioners' right a "lien" in the true sense of the word.

Utica Insurance Company vs. Power, 3 Paige, 365:

The creditor's bill mentioned in that case was not brought to set aside fraudulent transfers, and the decision was merely that the rights of the subsequent assignee of the choses in action were no greater than the rights of the assignor, and it was pointed out that the assignee, the common law rule still prevailing, did not take the legal title. For the purposes of the case at bar, we do not dispute that the creditor filing his bill obtained a right superior to a subsequent assignee of the judgment debtor; nothing was said in the case cited, of the effect of an insuperable obstacle, such as the Bankruptcy Act, preventing a creditor from recovering an effective decree.

Macy vs. Jordan, 2 Denio, 570:

The statement of law given in petitioners' brief is taken from the reported syllabus in that case, but an examination of the case shows its only authority is found in

the language of JEWITT, J., whose opinion was only one of three opinions delivered; the report fails to show any concurrence in this opinion on the part of the rest of the Court, the vote of the Court being given simply on the question of reversing the order below. On this vote, Mr. Justice JEWITT was one of twenty-two voting for reversal. In the other opinions other grounds were assigned.

M'Dermutt vs. Strong, 4 Johnson's Chancery, 687:

There the Court merely holds that the right of a creditor who has filed his bill cannot be affected by a subsequent assignment by the debtor of his property. The question of the effect on the creditor's suit of such an obstacle as the Bankruptcy Act was not considered. As we said a moment ago, in discussing *Utica Insurance Company vs. Power*, for the purpose of this case, we do not question that the right obtained by filing a creditor's bill is superior to the right of a subsequent assignee from the judgment debtor.

Smith vs. ——, 4 Edwards' Chancery, 653:

The Chancellor merely states that he "understands" this rule to be conceded by the United States Courts. His attention was evidently not called to the *Coster* case and other Federal cases holding a contrary view.

Mandeville vs. Campbell, 45 App. Div., 512:

This was a case of real estate and the creditor's rights were saved by a *lis pendens*.

We have thus seen that the decisions relied on by the learned counsel for the petitioners, in nearly every instance, involved nothing but the rights of a creditor who had filed a bill, as against subsequent assignees from the debtor, or else they were cases of real estate, where the creditor had saved his rights by filing a *lis pendens*. We have seen that the New York Courts have themselves considered that the

rule should be confined to cases where the creditor obtained the appointment of a receiver, and in this connection we would refer to *Osborn vs. Heyer*, 2 Paige, 342, where the Chancellor says it is the duty of the complainant to obtain such an appointment. This has been reiterated and followed in *Bloodgood vs. Clark*, 4 Paige, 574, and *Monroe vs. Schermerhorn*, Clarke Chan. Rep., 214.

Of the cases thus cited by the petitioners which do not on the above analysis lose most of their worth as authorities available against the conclusions of the Courts below, there remain one or two in which it appears, as above stated, that the Courts did deny the right of the trustee in bankruptcy as against the complainant in the judgment creditor's action. Now, so far as these cases are concerned, they are in conflict with the original decision of the United States Circuit Court of Appeals in the case at bar, and on this point it is proper to set forth that opinion of the latter Court bearing upon the questions here involved. The Court says *(Re Lesser*, 5 Am. Bank. Rep., 320, at p. 323*)*:

"In the carefully stated opinion of the District "Judge (100 Fed. Rep., 433) upon the legal questions "involved in this appeal we concur, and our con- "clusions can be stated as follows:

"Inasmuch as the petition in bankruptcy was filed "on May 12, 1899, less than four months after the "entry of the decree of the Appellate Division which "directed payment to Metcalf Brothers & Co. of their "judgments at law, their inchoate lien upon the fund "of $27,000 in the hands of the receivers was dis- "charged and released.

"By Section 67 *f* all liens obtained through legal "proceedings within four months prior to the petition "in bankruptcy become void, and the property af- "fected by the judgment is released from the lien, but "it is said that the equitable lien of the Metcalfs was "obtained in December, 1896, when the creditors' bill

" was brought. It is true, that by the commencement " of a creditors' bill in equity, the complainants " acquire what is called an equitable lien upon the " choses in action and equitable assets of the debtor, " which simply means a right to a decree for priority " of payment, in case of success, over other creditors. " It is sometimes called an inchoate lien, or a con- " tingent lien, but it is not a right in, or a right to " hold a particular article of property. It is not " like the lien obtained by the attachment of personal " property in an action at law by virtue of which a " sheriff obtains either actual or constructive pos- " session of the property attached, and in such a case " the lien is not obtained by the judgment, but by the " attachment, and we are not now prepared to say that " if the judgment is rendered within four months after " the petition in bankruptcy is filed that the lien by " attachment is vacated.

" The so-called equitable lien under a creditors' bill " upon the choses in action and equitable assets of the " debtor is simply a right ' in the successful event of " ' the action to priority of payment thereout, in pre- " ' ference to other creditors, irrespective of the " ' priority of the respective judgments ' (*First National* " *Bank vs. Shuler*, 153 N. Y., 163, 171). If the Court " which rendered the decree had power to create " priority, the right to priority is perfected, but, if the " judgment, so far forth as it directs priority, becomes " waste paper, the lien is gone. In this case, it is not " necessary to say that the entire judgment is null and " void, because the judgment was to the effect that the " transfers and assignments of personal property and " the receiverships were fraudulent and void, and this " part of the judgment is not affected by the Bankrupt " Act. The lien, however, which was created by the " judgment has become discharged by the provisions " of Section 67, and the Metcalfs cannot have the " benefit of the decree which directs payment to them " of their judgments in the actions at law because the

" preference created by the decree was made null by " the Bankrupt Act."

The opinions of the State Courts and of the inferior Federal Courts, are, we submit, overcome, so far as the mere weight of authority goes, by the opinions in the Courts below. But eliminating for the moment the latter, in considering the effect of the cases cited by the petitioners in which the question of bankruptcy was involved, we are brought to the broader view of the rule of *stare decisis* in the light of which this Court has more than once had occasion to make its rulings. In the Income Tax cases, it will be remembered, this Court was confronted by former decisions sustaining the validity of income tax laws, and involving a consideration of exactly the same portions of the Constitution that were involved in the cases before the Court. But it appeared that in the former cases there were aspects of the constitutional questions which had not been presented to the Court, and, therefore, in the later cases the Court could not, in view of its duties and responsibilities as a Court of last resort, shut its eyes to those aspects and those features of the questions involved which were then for the first time presented, even though a consideration of such aspects and such features might then lead to conclusions different from those reached by the Court in the old cases. The science of jurisprudence would be a lifeless and unprogressive one if there were no historic growth or development possible. Now, in the few cases cited by the petitioners, in which the rights of a creditor who had filed his bill were held to be superior to the right of the trustee in bankruptcy of a debtor whose petition in bankruptcy was filed within four months after the judgment in the creditor's action was obtained, there is no discussion of the nature of the lien from the point of view urged in the Courts below and taken by them. In all those cases it was assumed that the creditor *had* a *lien*, nor was any consideration taken of the inchoate and incomplete nature of the lien which

was so fully and carefully examined by the District Court and the Circuit Court of Appeals in the case at bar. Had the decisions in question been made by this tribunal, there might be some ground for urging a rigid application of the rule of *stare decisis*; but this Court having never had occasion to make an exact and exhaustive determination of the precise questions brought into being by the particular language of the present Bankruptcy Act, it will now on well-settled principles approach that question unembarrassed and unbound by the few decisions of the Rhode Island, New Jersey and Illinois state tribunals. These latter decisions will receive due weight, but they are in no sense binding decisions, nor are they effective in framing a general rule of law to which this Court should, on general principles of comity, yield, and they are in flat contradiction to the original decision of the Circuit Court of Appeals in this case. And we submit that that decision follows as a logical necessity from an analysis of the nature of the lien as it has been viewed and applied by Courts of equity.

3. The Cases on Attachment.

The learned counsel for the petitioners maintains that the validity of an attachment lien obtained more than four months prior to the filing of the petition in bankruptcy has been recognized as valid against the estate of the bankrupt, to support which he cites numerous cases arising under the former bankruptcy acts. We can put aside the question of the lien of an attachment, inasmuch as that question does not arise in the case at bar.

II.

All the property was tangible assets; consequently in no event could any lien have been obtained.

And it appears, from the certificate in this case that all the property affected by the alleged lien is in its nature subject to execution; there is nothing in the record to show that there were any intangible assets, and no presumption exists to that effect.

The property in question may be divided for the sake of clearness into the following classes:

I. Accounts transferred by Lesser Brothers to transferees not made parties defendant in the Metcalf action, or who were not served.

II. The real estate of Tobias and Israel Lesser transferred to Lilianthal.

III. Property in the hands of the Receivers, Franklin and Moses. This is of two kinds:

(a) Goods turned over to creditors under the order of November 23, 1896.

(b) Proceeds of goods sold by the Receivers.

IV. The outstanding accounts of Lesser Brothers assigned to transferees who are made parties defendant in the Metcalf action and who were served.

Class I.

No claim is made by the petitioners to the assets transferred included under Class I.

CLASS II.

As to the real property transferred to Lilianthal (Class II.), the Court below decided against us. We have not appealed from the order and, therefore, raise no question as to the correctness of this ruling.

CLASS III.

The property falling under each of the two subdivisions of Class III. must be separately considered.

(a)

No lien can be claimed by the petitioners on the assets included in subdivision (*a*)—*viz.*, the merchandise which was delivered over to the creditors and for which they gave bonds; that was property subject to execution.

(b)

As to subdivision (*b*) of Class III. it must be remembered that the judgment creditor's rights obtained by filing his bill are nothing more at the most than a *lis pendens* as to the property sought to be reached. This *lis pendens* operates only on the choses in action and the equitable assets of the debtor; it does not attach to property which is in its nature subject to execution. And this is true, although it may not be as a matter of fact possible to reach it by execution.

First National Bank vs. Shuler, 153 N. Y., 163, at p. 172.

The mere fact that it is in the hands of a fraudulent assignee or receiver makes no difference, because it remains property in its nature subject to execution.

We therefore contend that the property falling under subdivision (*b*) of Class III. is not subject to any

lien such as the petitioners claim, for that was also property in its nature subject to execution.

The judgment debtors had merchandise and accounts. The accounts were *choses in action*, that is, equitable assets; but the merchandise was clearly not of that nature. It passed on to the Receivers and from them to certain purchasers, and always remained property in its nature subject to execution. The *lis pendens* to which the commencement of the judgment creditors' action was equivalent was operative only as to the equitable assets belonging to the debtors, not to property of the debtors subject to execution and which became equitable assets in the hands of their transferees, the Receivers (see Nature of Judgment Creditor's Action, Bishop on "Insolvent Debtors," p. 340, *et seq*). Moreover, this property was converted into equitable assets, if at all, in the Receivers' hands at the instance of the Court, in an action to which the petitioners were parties, and by that order the proceeds were to stand in place of the original goods. A court of equity looks to substance and not to form, and the proceeds in the hands of the Receivers should be treated, as to the petitioners, as though they were the original goods. The only change of form which they had undergone was the result of an order of the Court, made *in invitum* as to the Lessers, and made for no other purpose than to serve the convenience of the defendants in that action, including these petitioners.

None of the cases cited by counsel for petitioners holds that tangible assets—tangible at the time the creditor's bill is filed—lose their character and become equitable assets as against conflicting claimants by reason of their sale under order of the Court.

In *Lawrence vs. Bank of the Republic*, 35 N. Y., 320, the only property was a bank account. There was no opportunity for any question of conversion.

Thurber vs. Blanck, 50 N. Y., 80, is the leading case on the proposition that a creditor's bill to reach equitable assets must be founded on a judgment, and that an attachment will not suffice. There was nothing but equitable assets involved, and there was no question of conversion.

Braem vs. M. N. Bank, 127 N. Y., 508:

We do not see the application of the principles of this case to the present situation.

CLASS IV.

As to the property falling under Class IV., that is not brought into question, inasmuch as the Appellate Division dismissed the action as to Adler, the transferee of accounts.

Thus we see that so far as this case is concerned the consideration of the priority obtained by filing a creditor's bill against intangible assets or property not in its nature subject to execution, is entirely an academic one. And it is equally clear that the third question "Did Metcalf "Brothers & Co., by the commencement of their "creditors' action acquire a lien on the property of "the bankrupts superior to the title of the trustee "thereto?" must be answered in the negative. Of course they did not by the commencement of their action acquire a lien, and it has never been contended that a judgment creditor, by the commencement of an action, acquired a lien against tangible assets.

The cases of *Yeatman vs. Savings Institution*, 95 U. S., 764, and *Stewart vs. Platt*, 101 U. S., 731, are discussed *infra* (p. 42).

We are thus brought to the consideration of the fourth and fifth questions certified.

III.

The inchoate lien was not perfected until the four months' period had begun to run.

The fourth question is as follows:

IF THE LIEN ACQUIRED BY THE COMMENCEMENT OF THE CREDITORS' ACTION WAS INCHOATE MERELY, WAS IT PERFECTED BY A JUDGMENT OBTAINED MORE THAN FOUR MONTHS PRIOR TO THE FILING OF THE PETITION OF THE LESSERS IN BANKRUPTCY WITHIN THE MEANING OF THE PROVISIONS OF THE ACT OF CONGRESS OF JULY 1, 1898, KNOWN AS THE BANKRUPTCY ACT ?

Lesser Brothers filed their petition in bankruptcy on the 12th day of May, 1899. A judgment or lien which would not be invalidated by the Act would have had to be entered or obtained against them before the 12th day of January, 1899. The only judgment appearing in the certificate that was so entered was the judgment entered on the decision of Justice RUSSELL, on the 6th day of April, 1898. That judgment did not perfect the inchoate lien obtained by Metcalf Brothers & Company, for, as appears in the certificate, the judgment determined that the property should be administered by the Receivers for the benefit of *all* the creditors of the co-partnership, and that Metcalf Brothers & Company *should not be allowed to levy an equitable execution on the assets of the debtors.* So far then as the judgment of Justice RUSSELL is concerned, that judgment gave Metcalf Brothers & Company no lien superior to

that of the creditors at large ; it was not until the subsequent judgment of the Appellate Division that they obtained a preference over the other creditors. To say that the judgment of Justice RUSSELL perfected the inchoate lien of the petitioners is paradoxical ; it practically turned them out of court ; it was they who appealed therefrom to the Appellate Division. Is it not convincing disproof of any saving grace in that judgment that, had they not successfully appealed therefrom, the question of their priority would not be before this Court ?

It should be noted that, in the State of New York, the date of the judgment is the date of its actual entry, and that the rule which prevails in some States, that the judgment for some purposes dates back to the first day of the Term, has no application to the case at bar.

It should be borne in mind that it is only the *judgment* in the judgment creditors' action which makes this so-called lien effective, and the Bankruptcy Act of 1898 expressly states (Sec. 67 *f*) that such a judgment obtained within the four months' period prior to the filing of the petition shall be void as against the trustee. It is not, therefore, the rights obtained by the service of their summons on which the petitioners in reality rely. They ask to be allowed to appropriate the fruits of their action attempted to be obtained by their judgment.

Since, then, the judgment of April 6th, 1898, failed to perfect any inchoate lien obtained by the commencement of the action, is there in the certificate mention of any other judgment which falls without the scope of the four months' period ? It was contended by the learned counsel for the petitioners that when the Appellate Division made an order or memorandum or direction to the Clerk, bearing date December 30, 1898, authorizing the plaintiffs in the *Metcalf* action to enter a judgment perfecting the inchoate lien, that by such

" memorandum," as our Court of Appeals has termed it, the plaintiffs actually did obtain a judgment.

It is, of course, difficult for this Court to determine the effect of a particular memorandum, entry, decree or judgment of a Court without having before it the actual instrument which it is considering. The language of the certificate itself, however, negatives any possible construction that this memorandum of December 30, 1898, was a *judgment*. Inasmuch as it is stated in the certificate that the Appellate Division still had before it the case for reargument, it must be presumed that it had before it the return, and that it had not yet parted with the case nor finally determined it. The particular language of the certificate states that " the delay in " the entry of final judgment was caused by vari- " ous motions before the Appellate Division for re- " argument." It is evident, therefore, that no judgment *could* have been entered up to the 31st day of January, 1899, perfecting the inchoate lien of Metcalf Brothers & Company.

The cases cited by the learned counsel to support his proposition that the judgment obtained by the petitioners should date from the authorization of the Appellate Court to enter a judgment and not from the time that the judgment was entered, do not sustain his contention. In not one of these cases was time of importance. In not one of these cases did the question of conflicting liens arise. In each case it was simply a question of whether or not the rights of a party had or had not been judicially considered and decided upon. That is the construction to be put upon the passages cited by the learned counsel from Black on " Judgments." Freeman in his work on Judgments, says, (Vol. I., § 37): " While " the entry is not the judgment, its absence tends " strongly to indicate that no judgment exists, and in " doubtful cases may be sufficient to sustain the issue " that whatever has been done has been but pre- " liminary to judgment. *Thus a memorandum*

" *handed down by an appellate court, of its decision*
" *on appeal, is not a judgment, but simply authority*
" *to enter one (Knapp vs. Roche,* 82 N. Y., 366).*
" An entry made by a judge in his calendar is not the
" judgment in the case. It is intended merely for the
" guidance of the clerk in entering orders and judg-
" ments, and cannot prevent the judge from sub-
" sequently signing and the clerk enrolling the final
" judgment *(Traer vs. Whitman,* 56 Iowa, 443*)*. The
" entry, though without it the judgment be conceded
" to exist, may be important in other respects besides
" that of establishing the terms of the judgment, as
" where, under the statute of a state, a judgment can-
" not be docketed so as to constitute a lien until after
" its actual entry *(Rockwood vs. Davenport,* 37 Minn.,
" 533; *Eastham vs. Sallis,* 60 Tex., 576*)*, or where
" judgments are in certain cases required to be recorded
" before they can affect innocent purchasers or en-
" cumbrancers *(Witter vs. Dudley,* 42 Ala., 616*)*."

And, again,

§ 39. * * * " But the distinction between a de-
" cree and an order for a decree must not be over-
" looked. 'No decree can be said to be entered of
" record until it is formally drawn out and filed by the
" clerk. A mere order for a decree, before it is ex-
" tended in due form and in apt and technical language,
" cannot be held to be a complete record of the judg-
" ment of the Court'" *(Thompson vs. Goulding,* 5 Allen, 81; *Gilpatrick vs. Glidden,* 82 Me., 201)."

The very fact that it is the judgment of January 31st, 1899, under which the petitioners would proceed to enforce their perfected lien, would indicate that their attempt to rely on the memorandum from the

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* What was there called a " memorandum " was precisely the same kind of instrument as the memorandum of December, 1898, of the Appellate Division. It was the usual order of affirmance, familiar to the New York practice.

Appellate Division of December 30th, 1898, is simply an afterthought.

The question under consideration in the certificate speaks of a "judgment." The only judgment that can legally be entered in the State of New York was the judgment entered pursuant to the authority therefor contained in the memorandum or order which is now said to be "a judgment." What constitutes a judgment is fully specified in the New York Code of Civil Procedure, Section 1355 :

> " * * * The *order* made upon the appeal must be entered in the office of the clerk of the Appellate Division, and a certified copy thereof with the original case or papers upon which the appeal was heard, filed as provided in Section 1353, must be transmitted by the clerk upon payment of his fees, to the clerk of the county where the judgment or order appealed from was entered, and upon such certified copy of the order and the case or papers upon which the appeal was heard, the County Clerk shall enter the *judgment* in his office."

And even the judgment entered upon such direction from the Appellate Court, the Code prescribes is not a complete judgment until it has been signed by the clerk and filed in his office.

> " Every interlocutory judgment or final judgment shall be signed by the clerk and filed in his office, *and such signing and filing shall constitute the entry of the judgment.*" (Section 1236).

The order of affirmance now relied on by the lienors is simply the formal memorandum, long in use as part of the machinery for procuring the judgment; it is what the Court of Appeals calls " simply the authority " for an entry of the judgment * * * merely a " memorandum of the decision of the General Term on " the appeal."

Its effect was fully and exhaustively considered in *Knapp vs. Roche*, 82 N. Y., 366. The instrument there under discussion was precisely similar to the instrument mentioned in the certificate; it began in the same way "At a General Term" *etc.*, followed by a formal recital of the proceedings and a formal modification of the judgment below and ending with the signature of one of the Justices. This, says the Court, "is not the judgment, but simply the "authority for an entry of the judgment *(Eno vs.* "*Crooke*, 6 Howard Pr., 462*)*. Waiving, therefore, all "questions as to the sufficiency of the papers on file "to constitute the basis of a judgment-roll on affirm-"ance, it is sufficient to say that no judgment of "affirmance has as yet been entered, for the reason "that what is called the judgment signed by Judge "SPEIR is merely a memorandum of the decision of "the General Term on the appeal. On filing that "decision a formal judgment of affirmance should "have been prepared which should have been entered "in the judgment-book and then been attested by the "signature of the clerk" (82 N. Y., at p. 369).

And it has been pointed out that the decision of the Court is not the judgment required by the Code, Section 1236.

Schenectady Plank Road Co. vs. Thatcher,
6 Howard Pr., 226.

The fifth question propounded to this Court is:

> IF THE LIEN ACQUIRED BY THE COMMENCEMENT OF THE CREDITORS' ACTION WAS INCHOATE MERELY, WAS THE JUDGMENT IN THE CREDITORS' ACTION, WHENEVER OBTAINED, ONE WHICH IS AVOIDED BY ANY OF THE PROVISIONS OF THE ACT OF CONGRESS OF JULY 1, 1898, KNOWN AS THE BANKRUPTCY ACT?

Under the provisions of the old act, the question before the Court could never have arisen.

As was pointed out in *Yeatman vs. Savings Institution*, 95 U. S., 764, the assignee in bankruptcy, under the old act, took nothing more than the rights of the bankrupt in the estate. Former Bankruptcy Acts contained no sweeping provisions invalidating preferences obtained in legal proceedings against the bankrupt before the adjudication. Whatever equity a debtor might have in his property passed to his assignee in bankruptcy, nothing more. The learned counsel for the petitioners relies much on the *Yeatman* case as an authority to support his contentions. A reading of the case, however, clearly shows that the decision in that case could in no way be held applicable to the case at bar. The Court says of the Act of 1867, at p. 766:

"The established rule is, that, except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupts."

So in *Stewart vs. Platt*, 101 U. S., 731, the Court held that the assignee had no greater rights against a holder of an unrecorded mortgage than his assignor, the bankrupt, had. But the new Bankruptcy Act introduces an entirely new principle; it provides that within four months prior to the filing of the petition in bankruptcy no creditor may by legal proceedings obtain a preference in the distribution of the estate of the bankrupt. So that, even though an action be begun more than four months prior, if the judgment be not obtained before the four months' period begins to run, the judgment itself falls.

The petitioners contend that their judgment was obtained in 1896 and that the particular clause in

question can in no way affect them. But what meaning then could be given to Section 67 *f*? Of course by the entry of their money judgment in 1896, the petitioners obtained no preference. If by that judgment they had obtained a preference, the Act could in no way affect them. Had they levied execution on the assets before the four months' period began they would have been safe against the subsequent title of the trustee in bankruptcy. Now, whether the subsequent judgment which they obtained in their judgment creditors' action within four months prior to the filing of the petition in bankruptcy was a decree *against the estate* of the bankrupts or one *in personam* merely, is for the purpose of the construction of the section absolutely immaterial. It would be a strange construction of the section which, where a bankrupt had conveyed his property to a third person, would allow a creditor to obtain satisfaction out of that property in the hands of the third person, yet which would prevent the same creditor from obtaining satisfaction out of the property in the hands of the debtor. It is the preference which the act condemns; in its terms it is broad enough to cover every conceivable way of obtaining that preference through legal proceedings, and whether by levy under execution, whether by judgment, whether by attachment or other lien, the preference obtained is void as against the trustee in bankruptcy.

The bankruptcy bill, as originally reported (Senate Bill, 1035). is printed in full in the "Congressional Record," Vol. 31, Part 2, pages 1778–84. In the original bill Section 67 consisted of four subdivisions, *a*, *b*, *c* and *d*, substantially in the present form of the subdivisions bearing the same letters. In the bill as finally reported by the Conference Committee ("Congressional Record," Vol. 31, Part 7, pp. 5960–5966) this Section 67 is enlarged by the addition of subdivision *(f)*, providing that all levies, judgments, attachments or other liens obtained through legal proceedings, *etc.*,

against the bankrupt shall be void if obtained within four months prior to the filing of the petition.

The sweeping character of this annihilation of preferences is familiar to this Court, by reason of the number and variety of instances in which such preferences have been adjudged to be void.

In the Conference Committee's report (§ XIX) read in Congress on the eve of the passage of the bill, it is pointed out ("Congressional Record," Vol. 31, Part 7, p. 6428) that, "By an addition to Section 67 [this very subdivision *(f)* now under consideration], "which relates to liens, the bill has been materially "strengthened. All levies, judgments, attachments, "and other liens obtained through legal proceed- "ings against a person who is insolvent, within the four "months before a petition is filed, are declared null "and void in case he is adjudged a bankrupt. *Bona* "*fide* purchasers for value on a sale under such a lien, "*etc.*, are fully protected. *In effect, liens of any descrip-* "*tion obtained upon the property of a bankrupt within* "*four months of the adjudication are made null and* "*void*, except when given for a new and fair considera- "tion to a person who has no notice of the insolvency "or no reasonable cause for inquiry."

The intention of Congress is thus manifest to provide that a person dealing with one who may afterwards become a bankrupt shall be protected, as he should be protected, that is, so far as he actually advances any money; but that as to all other persons, including all existing creditors, the race of diligence shall cease and all creditors shall stand equal before the law as of and from a date four months prior to the filing of the petition in bankruptcy. It would seem that language could no further go to make this intention of Congress absolutely clear and unmistakable.

The construction contended for by the lienors would emasculate this provision of the act; indeed, in one breath the lienors say their judgment is saved from the provisions of the act, because it is not a judgment

against the bankrupt, and in the same breath they say that their judgment is saved, because it is simply the final incident of a judgment originally taken against the bankrupt. In other words, it is saved because it is *not* obtained against the bankrupt and it is saved over again, because it *is* obtained against the bankrupt.

The Congressional debates show how this four months' avoidance of preferences was strenuously insisted upon from the beginning, how it was recognized by the minority in Congress, and how bitterly it was fought. For example, it was urged in opposition to the bill, that it was a sectional measure, and that it facilitated oppression on the part of Eastern merchants against small tradesmen in the West and South; that it was easy for such creditors to force a man into bankruptcy; and the reply was that it rather protected the local merchant from the dangers to which he was subject under the State insolvent laws, because it removed the incentive to his creditors to resort to drastic measures, such as attachment, inasmuch as such drastic measures would yield nothing to the creditor pursuing them, because they would be followed by the debtor going into bankruptcy, and the consequent elimination of the preference obtained.

Thus we see the reason for the "strengthening" provision of subdivision *f*, which the Conference Committee found it necessary to add to section 67 in in order to secure the passage of the bill. Congress by most broad and comprehensive language clearly intended to annihilate every preference obtained within four months, except such as was based upon actual advance of money.

IV.

The Court had jurisdiction to make the order.

We have shown therefore that what Metcalf Brothers & Company were trying to do was a clear violation of the provisions of the Bankruptcy Act. They were trying to appropriate assets that had passed to the trustee in bankruptcy, and they were trying to appropriate them under a lien declared void by the provisions of the act; and under the second question certified to this Court the inquiry is whether the District could, by summary proceedings, restrain them from so doing.

The question is as follows:

IF SAID COURT HAD JURISDICTION TO RESTRAIN METCALF BROTHERS & CO. FROM RECEIVING THE FUND IN QUESTION, COULD SUCH JURISDICTION BE EXERCISED BY SUMMARY PROCEEDINGS?

On the application of the trustee in bankruptcy an order issued out of the District Court directing the petitioners to show cause why they should not be enjoined from attempting to interfere with the estate of the bankrupts. The order granted a temporary injunction until the decision of the motion. Pursuant to agreement of counsel, the order was not personally served on the petitioners, but on their attorneys. On the return day the petitioners appeared specially, objecting to the jurisdiction of the Court, *but the petitioners argued the motion on the merits. They submitted an affidavit in opposition to the application of the trustee in bankruptcy*, and would seem thereby to have waived the question of whether or

not the District Court had acquired jurisdiction over them.*

However, whether they waived the question or not, the District Court did acquire jurisdiction over them. They were attempting to interfere with the estate of the bankrupts, and it was within the power of the Court of Bankruptcy to prevent such interference.

It needs no more than a brief examination of the second question to show that a negative answer thereto is absolutely precluded. For the question *assumes* that *jurisdiction* to grant the relief given existed in the District Court, and thus the question of jurisdiction generally has been left behind when we come to this question. The inquiry is, *assuming* that the District Court had jurisdiction, could such jurisdiction be exercised by summary proceedings? Now to say that the District Court had jurisdiction is to say that it might in some way exercise jurisdiction. Anything less would involve an absurdity. To say that there is no way in which a Court may exercise jurisdiction is to say that it has no jurisdiction; and, conversely, to say that it has jurisdiction, is simply another way of saying that it may exercise jurisdiction.

Now, so far as bankruptcy controversies and proceedings, (and, in fact, all such matters involving civil rights) are concerned there are, to use the classification of the petitioners, which is a correct and exhaustive classification, two ways, and two only, open to the Court. A court having jurisdiction of any such controversy (which by the second question the District

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* It is not contended that by appearing and arguing the motion on the merits the petitioners waived any objection to the jurisdiction of the Court to act in the premises or to exert its process over them; but they waived the necessity of formal service of the motion papers. But under the form of the second question *the Court assumes that the District Court had jurisdiction*, and the only inquiry is whether it might be exercised by summary proceedings.

Court is ASSUMED to have) may proceed and MUST proceed:

Either (1) by plenary suit; or (2) by summary proceedings.

This Court has decided in *Bardes vs. Hawarden Bank*, 178 U. S., 524, as the petitioners correctly maintain, that *the District Courts have no jurisdiction under the Bankruptcy Act to proceed by plenary suit.**

Therefore, assuming that the District Court has jurisdiction, as the second question does assume, it is manifest that such jurisdiction not only "*can* be exercised by summary proceedings," but that it *must* be so exercised, and can be exercised in no other way.†

Under the *Bardes* case, therefore, an affirmative answer must necessarily be given to the second question. The petitioners' real contention would have been expressed in some such question as this: "Inasmuch as in the case at bar the jurisdiction of the District Court could be exercised only by summary proceedings, should not that Court have *declined to exercise such jurisdiction* and have sent the litigants to some other forum where their rights might be adjudicated in a plenary suit?"

But when we put the question in this form the answer is clear. *This* court will not certify that the District Court should have declined to exercise jurisdiction: because;

In the first place, the exercise of jurisdiction by way of summary proceedings was the natural, historic and proper way of exercising jurisdiction in injunction proceedings.

(*a*) As uniformly exercised under this and former bankruptcy acts, *e. g.*, *Re Wallace*, 2 Bank. Reg., 52, quoted *infra*, p. 55.

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*Except in cases where the proposed defendants *consent* to the exercise of the jurisdiction (*Bardes vs. Hawarden Bank*, 178 U. S., 524, 536), which is not the case here.

†Except in the case specified in the preceding foot-note.

(*b*) As expressly authorized by U. S. R. S., Sec. 720; Bankruptcy Act. Sec. 2. Subd. 15; and Clause 3 of the Twelfth General Order in Bankruptcy, all quoted *infra*, p. 57, and all quoted and followed by this Court in *White vs. Schloerb*, 178 U. S., 542, 547.

And in the second place, because it was for the District Court, having *jurisdiction* to act, to determine whether or not it would act, and this Court will not, on a *jurisdictional* inquiry, overrule its determination.*

Disregarding this inevitable corollary flowing from the principles laid down in the case on which he himself chiefly relies, the learned counsel for the petitioners cites numerous authorities to show that the District Court could not by summary proceedings in this manner exercise jurisdiction over the petitioners, and that by reason of its wrongful act in attempting to exercise such jurisdiction the petitioners' rights were "summarily and finally tried on affidavits!" But the cases cited lead to no such conclusion, but to the contrary rather.

White vs. Schloerb, 178 U. S., 542, sustains the ruling of the Court below on the question of jurisdiction. The learned counsel cites it as sustaining his position. So far from holding that the United States District Court has no jurisdiction in bankruptcy to enjoin proceedings in State Courts, or that such injunctions may not be issued "summarily and finally on affidavits," this is a case where *such an injunction was issued and its issuance affirmed by this Court.*

None of the other cases relied on by the petitioners shakes the principle laid down by the District Court

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* Of course this does not prevent a review of the petitioners' contention that the determination of the District Court on the questions of *law* involved in the controversy was erroneous; that question is raised by the third, fourth and fifth questions certified; but it clearly prevents a negative answer to the second question certified.

" that it is manifest from the terms of the Act that the " Court has jurisdiction to restrain any person from " illegally possessing himself of assets and depleting the " estate, contrary to the terms of the Act, and in fraud " of the rights of other creditors " (100 Fed. Rep., at " p. 438).

Louisville Trust Company vs. Comingor, 184 U. S., ; 22 U. S. Sup. Ct. Rep., 293, relied on by the petitioners, was a case in which the District Court had attempted to decide the merits of a controversy between a general assignee of the bankrupt and the trustee in bankruptcy. The Referee reported that the assignee was withholding certain moneys as compensation but that his claim was for services which had been of no value, and the Court directed him to pay the trustee in bankruptcy a large sum of money. Any proceeding for this kind of relief was of course in the nature of a plenary suit, whether it was so called or not, and under the decision in *Bardes vs. Hawarden Bank*, no such suit could be entertained by the District Court. We have obtained no such relief nor asked for it. If the mere obtaining of an injunction were sufficient to make the proceeding a plenary suit, the Court could not have decided the case of *White vs. Schloerb* as it did, nor could it have decided *Mueller vs. Nugent*, 184 U. S., ; 22 U. S. Sup. Ct. Rep., 269, as it did.

In the case of *Bryan vs. Bernheimer*, 181 U. S., 188, the Court went even further than merely granting an injunction, and approved the order of the District Court directing the marshal to take forcible possession of the property in the hands of an adverse claimant. The Court states (at p. 197) that its remark in *Bardes vs. Hawarden Bank* that the power conferred on the Court " can hardly be considered as au- " thorizing the forcible seizure of such property in the " possession of an adverse claimant " was an inadvertence, and that the question before it in the *Bardes* case " *related exclusively to jurisdiction of a suit by the trustee* " after his appointment." And this case of *Bryan vs. Bernheimer* has been followed by the District Courts

as showing that the District Court had jurisdiction to make the injunction order in *the particular case at bar (In re McCartney*, 109 Fed. Rep., 621*)*.

Bardes vs. Hawarden Bank, 178 U. S., 524 :

All that was decided in that case, so far as the question of jurisdiction is concerned, was that the grant of jurisdiction to the Federal Courts in *suits* brought by trustees in bankruptcy to set aside fraudulent transfers, was, so far as the Bankruptcy Act was involved, confined to cases where the defendant consented thereto, and that this limitation was applicable to such suits when jurisdiction was claimed under Section 2, subdivision 7, authorizing the District Courts " to * * * determine controversies, * * * " except as herein otherwise provided." If we were bringing an action in the Federal Court against the Lessers' fraudulent transferees without their consent, this case would be an authority against us. We are bringing no such action, nor are we making any claim under Section 2, subdivision 7. What the District Court gave us was an order under the grant of jurisdiction contained in Section 2, subdivision 15, to

> " make such orders, issue such process, and enter
> " such judgments, in addition to those specifically
> " provided for, as may be necessary for the en-
> " forcement of the provisions of this Act."

Section 67 is one of " the provisions of this Act." If the petitioners' alleged " lien " falls within the prescription embodied in that section, and if they are proceeding to enforce it, and if, in the absence of restraint from the District Court, nothing can prevent them from enforcing it, then it seems a waste of words to point out that a restraining order is necessary to enforce this provision of the Act, and the District Court emphatically had jurisdiction to determine the question whether the petititioners'

alleged " lien " was within the prohibited class, and whether, in consequence, it had the power to make such an order. If it decided the question as to the existence of petitioners' lien incorrectly, then the injunction was unjustified ; the injunction was improper, not for want of jurisdiction, but on the merits. The correctness of its decision as to the alleged lien is the main question on this review.

The only questions are : Do the facts warrant it ? Is the lien void ?

And the authorities that we have discussed show that these questions must be answered in the affirmative.

In the *Bardes* case it was finally decided, setting at rest many conflicting decisions in the Courts below, that the District Courts could not, except with the defendant's consent, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third persons before the institution of bankruptcy proceedings. For a clear understanding of this case and of the case of *White vs. Schlocrb*, 178 U. S., 542, decided simultaneously therewith, it is convenient to refer again to Section 2 of the Bankruptcy Act. That section vests in the courts of bankruptcy—in other words, in the United States District Courts—a jurisdiction the enumeration of which extends over 19 subdivisions. Two only of these subdivisions are necessary to be considered here ; these two subdivisions authorize the District Court to act as follows :

" (7) Cause the estates of bankrupts to be col-
" lected, reduced to money and distributed, and *de-*
" *termine controversies* in relation thereto, except as
" herein otherwise provided."

" (15) Make such orders, issue such process and en-
" ter such judgments, in addition to those specifically
" provided for, as may be necessary for the enforce-
" ment of the provisions of this Act."

It is not necessary to go over in detail all the ground

covered by the exhaustive opinion in *Burdes vs. Hawarden Bank*; the opinion was written by Mr. Justice GRAY and was concurred in by all the Court, and it has since that time been so frequently discussed that the Court is quite familiar with it. Suffice it to say that the Court points out the distinction between *proceedings in bankruptcy* and independent suits between assignees in bankruptcy and adverse claimants. Under the Act of 1867 the distinction between proceedings in bankruptcy, properly so-called, and independent suits at law or in equity between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared (*Ibid.*, p. 533). The Court first points out that under the former act the concurrent jurisdiction of the State Courts over such *suits* was maintained. In that case the appellant relied upon the language of subdivision (7) above quoted, authorizing the District Courts, sitting as Courts of Bankruptcy, "to determine controversies in relation "thereto" and maintained that suits are "controversies;" this claim was met by pointing out that this grant of jurisdiction is controlled and limited by the concluding words of the clause "except as herein otherwise provided." These latter words, says the Court, "evidently refer to Section 23 of the Act," and Section 23 limits the jurisdiction of the U. S. Circuit Courts to cases where suits might have been there prosecuted had there been no bankruptcy, limits it, in other words, to cases involving more than $2,000 and having the requisite diversity of citizenship, and limits the jurisdiction of the U. S. District Courts over such suits to cases where the defendant consents to the exercise of such jurisdiction (*Ibid.*, 535, 536). Clearly then a trustee, unless he were a citizen of a different State from the proposed defendants, could not maintain a plenary action in the U. S. Circuit Court, and could not without a defendant's consent maintain a plenary action in the U. S. District Court. Were we attempting to maintain a plenary

action, relief would necessarily have been denied us; a plenary suit in equity would manifestly not be maintainable in the District Court. As this Court says in *Bardes vs. Hawarden Bank*, the section (§ 2) nowhere mentions civil actions at law, or plenary suits in equity; and no intention to vest the Courts of Bankruptcy with jurisisdiction to entertain such *actions and suits* can reasonably be inferred from the grant of the incidental powers in subdivision 15 to make orders, issue process and enter judgments necessary for the enforcement of the provisions of this act (*Ibid.*, 535). But the same determination that excludes from the jurisdiction of the District Courts the maintenance of plenary suits in equity leaves to the District Courts the unquestioned jurisdiction in "proceedings in bankruptcy," the distinction being retained with unabated vigor as in the Act of 1867. And in such proceedings in bankruptcy the District Court has power "to make such orders, issue such process, and "enter such judgments, * * * as may be nec- "essary for the enforcement of the provisions of this "Act." If the District Court did not have such power, the Bankruptcy Act would be a nullity.

And when has it ever been heard that a mere restraining order postulated a "plenary suit," or needed a plenary suit to give it vitality? Restraining orders have been granted as incidents of proceedings in bankruptcy ever since there have been such things as proceedings in bankruptcy. If a restraining order needed a plenary suit as its foundation, the decision of this Court in *White vs. Schloerb* would have been a perversion of equity.

That the order made in this proceeding by the Court below was an order made in proceedings in bankruptcy is not, we suppose, seriously questioned. We claim that it was "necessary for the enforcement of the provisions" of the Bankruptcy Act, and the lienors claim that it was not necessary; and this question was the main question discussed by both the Courts below,

and is the main question on this review. Both the Courts below have determined that the threatened act of Metcalf Brothers & Company would have resulted *pro tanto* in a nullification of the Bankruptcy Act, because they were attempting to appropriate property by virtue of a lien which that act declared to be invalid. If the lien was not invalid, then no violation of the Bankruptcy Act is threatened, and, of course, there is no provision of it to be enforced, and the injunction was erroneous; but, if the lien was invalid, then it seems a waste of words to say that the restraining hand of the Court was necessary to enforce the provisions of the act. The writ of injunction is one of the most ancient prerogatives of the court of equity, and, as this Court has pointed out, and as it applied its ruling in *White vs. Schloerb*, it is within the class of "proceedings in equity" and "proceedings in bankruptcy" mentioned in Section 2.

"* * * In exercising the equity power which "pertains to this Court as a Court of Bankruptcy it is "not deemed necessary or proper that resort should be "had to the formal and plenary proceedings common "to suits in equity in the Circuit Court. A petition "stating the facts and praying for the order, relief or "proceeding sought for, is deemed sufficient."

Re Wallace, 2 Bankrupt Register, 52, at p. 53.

As Mr. Justice STORY said in the *Christy* case, there is nothing particularly sacred in the machinery of a plenary suit rather than in that of a summary proceeding. From the very nature of the case Courts of Bankruptcy must proceed by summary proceedings, and, as this Court has indicated in the *Bardes* case, under the present Bankruptcy Act they can proceed in no other way.

It has been pointed out in the United States Circuit Court of Appeals for the Eighth Circuit that, in determining bankruptcy controversies, the Courts have discretion whether they will act by plenary suit or sum-

marily on motion. Of course they cannot act by plenary suit unless a diversity of citizenship exists; but, where such diversity does exist, they may act in either way, and the usual and normal way is by summary proceedings. "*Ordinarily* they should act with as much ex- "pedition as possible when complaint is made that "under color of process the rights of third parties "have been invaded" (*In re Young*, 111 Fed. Rep., 158, at p. 161).

The cases that we have cited show that the power of restraining threatened interference with the hand of the Court has never been considered to be merely an exercise of jurisdiction belonging to plenary suits, but rather as an essential and universal component of the jurisdiction of the Court itself. As Judge LOWELL said in a case where a bankrupt sought an injunction to restrain his former wife from prosecuting in the State Court proceedings to obtain alimony already granted her by a decree of that Court: "This Court has therefore to "determine the effect of bankruptcy upon alimony. If "a discharge in bankruptcy will bar the wife's claim "for alimony, she may be enjoined from seeking "to collect it by contempt proceedings or other- "wise" (*In re Nowell*, 99 Fed., 931). The injunction was necessarily granted in a summary proceeding, and the opinion of Judge LOWELL was approved by this Court and characterized as "a careful opinion" (*Audubon vs. Shufeldt*, 181 U. S., 575, 578).

The clearest exposition of the inclusion of such injunction orders within the classification of orders and process "necessary for the enforcement of the provisions" of the Bankruptcy Act, is found in *White vs. Schloerb*, 178 U. S., 542. In that case the District Court went further than was asked for or done in this case, because the act complained of consisted of taking under writ of replevin in the State Court property belonging to the bankrupts. And the question certified to this Court was "Whether the District Court

" sitting in bankruptcy had jurisdiction by summary " proceedings to compel the return of the property " seized ? " Not the remotest suggestion appears anywhere in the opinion that the exercise of the power of injunction was considered as partaking in any respect of the nature of a plenary suit, or that it was anything but a proceeding in bankruptcy. The Court answers the question certified, as we submit it must answer the second question in this case, by placing in juxtaposition Section 720 of the Revised Statutes, recognizing the right to issue an injunction in bankruptcy proceedings, with Section 2, subdivision 15, of the Bankruptcy Act above quoted and Clause 3 of the Twelfth General Order in Bankruptcy. The writ of injunction in such a case as this is part and parcel of a proceeding in bankruptcy; it is authorized by the Twelfth General Order just mentioned, which in express terms authorizes application to a Court of Bankruptcy for an injunction to stay proceedings, and provides that it shall be heard and decided by a Judge.

The Court says (at p. 547):

> " By Section 720 of the Revised Statutes " ' the writ of injunction shall not be granted by " ' any court of the United States to stay proceed- " ' ings in any court of a State, except in cases " ' where such injunction may be authorized by " ' any law relating to proceedings in bankruptcy.' " Among the powers specifically conferred upon " the court of bankruptcy by section 2 of the " Bankrupt Act of 1898 are to (15) ' make such " ' orders, issue such process, and enter such judg- " ' ments, in addition to those specifically provided " ' for, as may be necessary for the enforcement of " ' the provisions of this act ' (30 Stat., 546). And " by clause 3 of the Twelfth General Order in " Bankruptcy applications to the court of bank- " ruptcy ' for an injunction to stay proceedings of

" ' a court or officer of the United States, or of a
" ' State, shall be heard and decided by the judge;
" ' but he may refer such an application, or any
" ' specified issue arising thereon, to the referee
" ' to ascertain and report the facts' " (172 U. S., 657).

Exactly the same reasoning was followed by the United States Circuit Court of Appeals in the case at bar.

" * * * As Section 67 gives the Court of Bank-
" ruptcy power to make orders in the premises, it
" was also proper for that Court to proceed as a Court
" of Bankruptcy, by order and notice upon a summary
" petition, and direct the Metcalfs not to go into
" the State Court upon their own motion and attempt
" to obtain payment. Subdivision 7 of Section 1 de-
" fines 'Court' to mean the Court of Bankruptcy in
" which the proceeding is pending, and to the Court
" of Bankruptcy power is specifically given by sub-
" division 15 of Section 2, ' to make such orders in
" ' addition to those specifically provided for as may
" ' be necessary for the enforcement of this act.'
" If this order is to be regarded as an injunction to
" stay proceedings of the State Court, it was author-
" ized by Clause 3 of the Twelfth General Order in
" Bankruptcy, which provides that applications to the
" Court of Bankruptcy for an injunction to stay
" proceedings of a Court of the State shall be heard
" and decided by the Judge."

In re Lesser, 5 Am. Bank. Rep., 320, at p. 325.

Smith vs. Mason, 14 Wall., 419, arose under the Act of 1867, which did not contain the provisions of the present Act relative to the issue of orders and process " necessary for the enforcement of the provisions of " this Act "; moreover, the injunction there complained of was much more than an injunction, and embodied an actual direction for the payment over of money.

Marshall vs. Knox, 16 Wall., 551, is similar to *Smith vs. Mason*, and subject to the same observations.

Peck vs. Jenness, 7 How., 612, came up on a writ of error to review the judgment of a State Court, which had upheld the title of a creditor who had levied an attachment prior to the bankruptcy. It overruled a rejoinder by the assignee setting up an injunction issued by the State Court against the attachment creditor, holding that § 720 of the United States Revised Statutes forbade Federal injunctions against proceedings in State Courts, and that the Bankruptcy Act of 1841 contained no provisions authorizing injunctions by the District Court. That section of the Revised Statutes has since been amended. The case is sharply distinguished from the present case by the fact that the Act of 1898 *does* authorize summary injunctions (*e. g.*, *White vs. Schloerb*, 178 U. S., 542).

Rouse vs. Letcher, 156 U. S., 47, simply asserted the comprehensive jurisdiction of the United States Circuit Courts over claims against property in the hands of the officers of that Court, and held that the jurisdiction in such case did not rest on diversity of citizenship. It was not a bankruptcy case.

Taylor vs. Carryl, 20 How., 583, merely held that where property has been levied on it is not liable to be taken by an officer acting under another jurisdiction.

Clark vs. Rist, 3 McLean, 494, cited by the learned counsel, was a case under the Act of 1841; it is not an authority on the question of jurisdiction at all. It merely holds that under the Act of 1841 the creditor in that case had a lien, valid under the laws of Ohio, which was expressly saved by the Bankruptcy Act of 1841, and that for that reason an injunction should not issue. The question of

whether the creditor had such a lien was then very fully discussed and there was no intimation that the Court would have refused an injunction if it had appeared that the creditor was not, as a matter of fact, saved in his lien by the Bankruptcy Act.

Ex parte Waddell, Fed. Cases, 17,027, appears misplaced in petitioners' brief. It contains an exhaustive review of the main subject, reaching a conclusion adverse to the petitioners' claim of a lien; it has been fully discussed by us *(supra*, p. 20*)*. But it has no bearing on the question of jurisdiction. It refused an order on the State Court receiver compelling him to turn over property in his hands. We have obtained no such order, nor asked for it.

Johnson vs. Bishop, Fed. Cases, 7,373. Here the Circuit Court naturally refused to grant an order directing the Sheriff holding the bankrupt's property under attachment from the State Court to deliver the property to the assignee in bankruptcy. If, in the case at bar, the property were all in the hands of the Receivers, and if we were asking for an order directing these Receivers to turn it over to us, then a comparison of the case cited in the light of the Act of 1867, under which it was decided, with the case at bar, in the light of the Act of 1898, under which the latter has been decided, might be profitable. But, as pointed out above, we have obtained no such order, nor asked for it. The only order asked or obtained was one restraining Metcalf Brothers & Co. from using their void judgment to seize from the Receivers property the title to which the Bankruptcy Law has vested in the trustee. Our remedy, it must be remembered, is a negative and partial one. It is by no means of the far reaching import which so excites counsel's apprehension. We have still the hardest part of our work in front of us. If the Receivers refuse to turn over the property, we must sue them, and

we cannot maintain our action except in the State Court. And even after we get the property, the Courts are open to the petitioners to sue us for its recovery. We are asking no judgment against them now, nor are we asking that they turn over any property. We are simply restraining them from taking forcible possession, under void process, of property which, presumptively at least, belongs to us.

Goodrich vs. Remington, 6 Blatchf., 515, must have been referred to by oversight. There the plaintiff brought suit in the United States Circuit Court as assignee in bankruptcy against the receiver appointed in the State Court of a bank which it was alleged really consisted of nothing but the bankrupt. This again might be of interest if we had asked or obtained an order directing the Receivers to transfer the property to us. It seems as if no authorities were needed to show that such relief would not be granted, and yet in this very case cited, the Court devotes practically the whole opinion to a discussion of the merits, and merely remarks in conclusion (at p. 520):

"As the decision is against the alleged right of the "plaintiffs to the subjects of controversy, it is also "unnecessary to consider the question raised by the "defendants, in regard to the right of the State Courts "to decide the questions of property involved, by rea-"son of their having, as it was insisted, obtained juris-"diction," *etc.*

Re Clark, Fed. Cases, 2,798, was merely another instance of the refusal of the Federal Court to interfere with the possession of the receiver in the State Court or to order him to turn property over to an assignee in bankruptcy.

Alden vs. Boston H. & E. R. Co., Fed. Cases, 152:

This case again seems misplaced in our opponents' brief. The Court holds, as it has always held, that a

railroad in the hands of receivers appointed by a State court must be regarded as being in the possession of that Court, and that it is not for another Court to interfere with such possession "*at least until the title* " *of the receivers is impeached for some cause for which* " *it is impeachable under the Bankrupt Act.*"

We do not rely on this language for our authority for the injunction, but we quote it as showing how widely divergent were the questions considered in the case cited from those in the case at bar. The only practical interest of the case cited lies, so far as we can make out, in the fact that the Federal Court did in that very case issue an injunction against the State Court receiver ; another instance of the writ of injunction as the well-recognized and long familiar instrument in the hands of Federal Courts on a summary application, rather than the monstrous and unheard-of weapon which the petitioners regard as invented by the Court below for the first time for this particular case.

Sedgwick vs. Menck, 1 N. B. R., 675 :

In that case the judgment creditor had not only filed his bill, but had *recovered judgment setting aside an assignment* by one Beiser ; and *nine years thereafter*, Congress having meanwhile passed a Bankrupt Act, and Beiser having become bankrupt, his assignee applied by bill to the United States Circuit Court to compel the State Court receiver to turn over to the assignee the property of the bankrupt which had been included in the void assignment. It goes without saying that the application was denied. There is not the faintest resemblance to the circumstances in the case at bar.

But nearly all these cases cited by petitioners either were under former and different Bankruptcy Acts or were not bankruptcy cases at all. In some of them, as we have seen, injunctions were allowed, which of itself is an absolute negation of

the petitioners' theory that injunctions may not be granted except in a plenary suit; and the only cases where relief was refused were where the applicant sought to have the Federal Courts take forcible possession of property in the hands of officers of State Courts.

In *re Gerdes*, 102 Fed. Rep., 318, the Court denied an application for an injunction staying proceedings begun before the bankruptcy to foreclose a mortgage made by the bankrupt before his bankruptcy. It is difficult to see on what ground such an application could have been granted.

In *re Kavanaugh*, 99 Fed. Rep., 928, Judge EVANS, sitting in the District of Kentucky, entertained the application on the merits, and on a state of facts somewhat similar to those in the case at bar arrived at a conclusion different from that of the Court below. But the application for an injunction is taken up and decided on its merits, and there is no suggestion that the District Judge doubted his power to issue a summary injunction on affidavits in a case where the judgment creditor's "lien" was in violation of section 67*f*.

Re Russell, 101 Fed. Rep., 248, has no bearing on the question of jurisdiction. There *a suit in the State Court was enjoined*, the Court remarking that Section 720 of the United States Revised Statutes prohibits Federal injunctions against proceedings in State Courts, *except injunctions under the Bankruptcy Act*, and that the case there presented was a proper case for injunction.

Frazier vs. Southern Loan and Trust Co., 99 Fed. Rep., 707, much relied on by our opponents, in fact makes our position clearer. As we have shown, the mere filing of a creditor's bill creates no general and absolute lien against equitable assets, but only an inchoate

lien, liable to be defeated by discontinuance of the action or by anything preventing final judgment; the appointment of a Receiver on behalf of the judgment creditor is the only way in which the permanence of the lien may be effected. It might be true that if the lien rested upon a receivership and possession thereunder, created more than four months prior to the bankruptcy, that in such case the Court might not prevent the lienors from enforcing all rights to the receivership assets subsequently conferred upon them, even though such rights might be conferred within four months of the bankruptcy; the receivership might perhaps preserve their rights. Even the New York State Courts, whose decisions are relied upon to maintain the theory that filing a creditor's bill gives a plenary lien, have intimated that it might be better to confine the rule to cases of a receivership (*Stewart vs. Isidor*, 5 Abb. Pr. N. S., 68, 70). Be that as it may, we mention it here merely to point out that the *Frazier* case, so much relied on, is in no way opposed to our contention, for in that case there had been a receivership in the creditor's suit in the State Court. It is difficult to see how an injunction could properly have been issued in such a case. The District Judge, whose decision was reversed, seems to have laid stress on the fact that the Receiver had nothing in his *possession*, and there were circumstances that made the State Court proceedings appear in some sense to work injustice. But the Circuit Court of Appeals paid very little attention to the notion of any plenary lien obtained by the filing of the creditor's bill, and reversed the case on the ground that whether or not the State Court by its receivership in the creditor's suit had *possession*, it had complete and exclusive control over the property. So far as that case bears at all upon the question of jurisdiction it is an authority in our favor, because, like the case just before referred to, it takes up on its merits an application for a summary injunction on petition, and

holds that in that particular case the petitioner is not entitled to an injunction, with no intimation of any reason why a summary injunction should not issue, where the facts warrant it, against a person attempting to enforce one of the alleged "liens" which the supreme law of the land, expressed in the Bankruptcy Law, has declared to be null and void.

Pickens vs. Dent, 106 Fed. Rep., 653, was decided on the principle of comity, a point not raised by the questions certified to this Court in the case at bar.

The order of the District Court should be affirmed with costs, and the questions certified answered as follows:

The first question, if answered at all, should be answered in the affirmative: "The District Court of the United States had jurisdiction to make the injunction order in question."

The second question should be answered in the affirmative: "Such jurisdiction could be exercised by summary proceedings."

The third question should be answered in the negative: "Metcalf Brothers & Co. did not, by the commencement of their creditors' action, acquire a lien on the property of the bankrupts superior to the title of the trustee thereto."

The fourth question should be answered in the negative: "The inchoate lien acquired by the commencement of the creditors' action was not perfected by a judgment obtained within four months prior to the filing of the petition of the Lessers in bankruptcy within the meaning of the provisions of the Act of Congress of July 1, 1898, known as the Bankruptcy Act."

The fifth question should be answered in the affirmative. "The judgment in the creditors' action was one which is avoided by the provisions of the Act of Congress of July 1, 1898, known as the Bankruptcy Act."

All of which is respectfully submitted.

Washington, October Term, 1901.

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